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Nos. 92-155 and 92-219

Supreme
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In The

Supreme Court of the United States

October Term, 1992

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, et al.,

Appellants,

v.

NICK THEODORE, et al.,

Appellees.

CARROLL A. CAMPBELL, JR., GOVERNOR OF SOUTH CAROLINA,

Appellant,

v.

NICK THEODORE, et al.,

Appellees.

On Appeal From The United States District Court For The District Of South Carolina

BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

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I. This Case Is not Moot

The appellees contend in their motions to dismiss or affirm that the court ordered plans in this case are merely "interim" and for that reason should not be reviewed by this Court. They argue that the court ordered plans might become moot in the event the general assembly and governor enact new legislative plans. *See, e.g.*, Motion of Appellee Lieutenant Governor Nick Theodore to Dismiss or Affirm, p. 12.

1. First, while the three judge court expressed its "hope" that the general assembly and the governor would fashion acceptable permanent plans, App. 85, it clearly intended that the court ordered plans would be permanent in the absence of legislative action. According to the three judge court, the court ordered plans

> shall be the lawful election districts for each of those bodies for the general elections scheduled in 1992, and for all subsequent elections until redistricting plans for those bodies are lawfully enacted by the South Carolina General Assembly, signed by the Governor, and approved by the United States Department of Justice pursuant to 42 U.S.C. § 1973c.

App. 86.

Second, there is no assurance that the court ordered plans will not become permanent through inaction of the legislature. Third, given the legislative deadlock in this case, there is no reason to believe the general assembly and the governor could enact legislative plans even if they attempted to do so.

Fourth, experience has shown that in South Carolina once elections are held under a court ordered plan there is little or no incentive for incumbents to replace it with a legislative plan. That is not surprising since incumbents could hardly be expected voluntarily to change the districting system under which they were elected to office. In *South Carolina State Conference of Branches of NAACP v.*

Riley, 533 F.Supp. 1178 (D.S.C. 1982), for example, the three judge court drew an "interim" plan for the 1982 congressional elections. Elections were held under the plan and the general assembly never enacted a replacement. The interim plan became the permanent plan and remained in effect through 1990.[1]

Fifth, under the standard of mootness argued for by the appellees no court ordered plan could ever by challenged – either in the district court or on appeal – for the general assembly and the governor always have it within their power to enact a substitute legislative plan. This Court has never applied such a concept of mootness in election cases and has frequently reviewed "interim" court ordered plans. *See, e.g., Jordan v. Winter*, 541 F.Supp. 1135 (N.D.Miss. 1982), *vacated and remanded sub nom. Winter v. Brooks*, 461 U.S. 921 (1983); *Upham v. Seamon*, 456 U.S. 37 (1982).

2. This Court has held that "[t]he burden of demonstrating mootness 'is a heavy one.' " *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), *quoting United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). A case is moot only when it can be said with assurance that "there is no reasonable expectation" that the alleged violation will recur, and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." 440 U.S. at 631. Neither condition is satisfied here.

It cannot be said with assurance that there is no reasonable expectation that the court ordered plans will

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[1] Graham v. South Carolina, Civ. No. 3:84-1430-15 (D.S.C. July 31, 1984), cited by appellees, is not to the contrary. There a three judge court imposed an interim plan for the 1984 state senate elections. Literally within days of the court's decision the general assembly enacted a legislative plan which was precleared by the Attorney General and used in the pending election. The three judge court vacated its interim plan and it never went into effect. Order filed August 13, 1984.

be used in future elections. Indeed, the reasonable expectation is that they will be. In addition, even if the general assembly and the governor were to enact permanent legislative plans, interim use of the court ordered plans would have continuing effects. One of those effects would be the establishment of a discriminatory benchmark, *i.e.*, the court ordered plans themselves, for determining whether the legislative plans were retrogressive under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *See, Mississippi v. Smith*, 541 F.Supp. 1329, 1333 (D.D.C. 1982) (an intervening court ordered plan is the proper benchmark for determining retrogression under Section 5), *appeal dismissed*, 461 U.S. 912 (1983).

3. SRAC's challenge is not limited to a particular election but to the plans adopted by the three judge court. The issues presented in this case, and their effects, will persist as the court ordered plans "are applied in future elections." *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974). Thus, this case presents a classic example of a controversy that is "capable of repetition, yet evading review," *Rosario v. Rockefeller*, 410 U.S. 752, 765 n.5 (1973), *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972), and is not moot.

4. In the unlikely event that the general assembly and the governor were to enact and preclear new legislative districting, it would be appropriate at that time to consider the issue of mootness. Until then "[t]he normal rule in a civil case is that we judge it in accordance with the law as it exists at the time of our decision." *Tully v. Mobile Oil Corp.*, 455 U.S. 245, 247 (1982).

II. The Issues in this Case Should Be Resolved Now and without Unnecessary Delay

The appellees argue that this appeal should be dismissed or affirmed because SRAC can always file another law suit after the 1992 elections are over. Motion to Dismiss or Affirm of the Democratic Party of South Carolina,

p. 17; Motion of Appellee Lieutenant Governor Nick Theodore to Dismiss or Affirm, p. 14. The argument is directly contrary to the stated intent of Congress that minorities should not bear the burdens of inertia and delay in litigation and that voting rights disputes be disposed of quickly, comprehensively, and finally.

Responding to the "insidious and pervasive evil" of discrimination in voting, Congress enacted the stringent remedial provisions of the Voting Rights Act "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 328 (1966). In the legislative history of the 1965 Act, as well as the 1970, 1975 and 1982 extensions, Congress repeatedly expressed its intent "that voting restraints on account of race or color should be removed as quickly as possible in order to 'open the door to the exercise of constitutional rights conferred almost a century ago.' " *NAACP v. New York*, 413 U.S. 345, 354 (1973), *quoting* H.R. Rep. No. 439, 89th Cong., 1st Sess. 11 (1965). *Also see*, 2 S.Rep. No. 417, 97th Cong, 2d Sess. 5 (1982) ("[o]verall, Congress hoped by passage of the Voting Rights Act to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally"); *Briscoe v. Bell*, 432 U.S. 404, 410 (1977) (the Voting Rights Act "implements Congress' intention to eradicate the blight of voting discrimination *with all possible speed*") (emphasis added).

Given the clear and unambiguous intent of Congress that voting rights disputes be resolved promptly and that the door to minority political participation be opened as quickly as possible, there is no basis for dismissing or affirming this appeal and requiring SRAC to file another law suit after the 1992 elections have been held. Such a course is nothing more than a prescription for the delay, or denial, of equal voting rights and the multiplication of litigation.

The appellees' argument that SRAC can more effectively challenge the court ordered plans after the 1992 elections and that the opinion of the three judge court "did not have res judicata effect" lacks candor. Motion to Dismiss or Affirm of the Democratic Party of South Carolina, pp. 17-8. While SRAC, or anyone else, could file a Section 2 law suit after the 1992 elections the defendants, in the event this appeal were dismissed or affirmed, would surely argue that the Section 2 issues had previously been considered and decided adversely to the plaintiffs by the three judge court here and that further challenge was practically, if not legally, foreclosed. Indeed, that is the very argument that the appellees make *in this case. See, e.g.*, Motion of Appellee Lieutenant Governor Nick Theodore to Dismiss or Affirm, p. 23 ("the district court properly analyzed its plans under Section 2"). The appellees' argument that SRAC would be in a better position to challenge the court ordered redistricting if this appeal were dismissed or affirmed cannot be credited.

III. The Three Judge Court Failed to Make Adequate Section 2 Findings; the Appeal Cannot Be Affirmed

The appellees, as noted *supra*, argue that the three judge court correctly applied Section 2 standards in this case. There are two major flaws in the appellees' argument.

First, the three judge court itself disavowed that it conducted a complete Section 2 analysis. As the opinion unequivocally states, "the court decided against conducting a full § 2 inquiry." App. 44. Second, even assuming the three judge court did what it said it did not do, it made no, or grossly inadequate, Section 2 findings of fact making meaningful judicial review impossible.

The three judge court made no specific findings concerning the extent to which blacks were politically cohesive, the extent and legal significance of racial bloc voting;

by whites,[2] nor the extent of minority office holding as provided for by *Thornburg v. Gingles*, 478 U.S. 30, 50-1 (1986). It also made no specific findings regarding the other factors identified in the legislative history as probative of minority vote dilution, such as the extent of any history of official discrimination, the use of enhancing devices, and the socio-economic status of blacks.[3] In the absence of such findings it is impossible to know the basis of the court's decision, or for this Court to review that decision.

One of the basic purposes of the requirement of Rule 52(a), F.R.Civ.P., that a court sitting without a jury "shall find the facts specially" is to facilitate review by affording the appellate court "a clear understanding of the ground or basis of the decision of the trial court." 9 C. Wright & A. Miller, *Federal Practice and Procedure:* Civil § 2571 at 679 (1971). The rule has special application in voting cases. According to the Fifth Circuit, which had a leading role in developing the jurisprudence Congress incorporated into the 1982 amendment of Section 2, S.Rep. No. 417, *supra*, at 32, "[p]erhaps in no other area of the law is as much specificity in reasoning and fact finding required, as shown by our frequent remands of voting dilution cases to district courts." *Cross v. Baxter*, 604 F.2d 875, 879 (5th Cir. 1979). *Accord, Nevett v. Sides*, 533 F.2d 1361, 1365 (5th Cir. 1976) (an appellate court cannot affirm a trial court's determination of vote dilution "without findings of fact to fit proper standards").

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[2] The three judge court held only that the extent to which voting is racially polarized "remains an open question," and that "the parties' stipulation that since 1984 there is evidence of racially polarized voting in South Caroina is sufficient for our analysis of the plans." App. 56.

[3] Appellee South Carolina Senate admits the failure of the court to treat these factors but argues that it was "unnecessary" to consider them. Motion to Dismiss or Affirm, p. 15.

This Court has similarly required a high degree of specificity in reasoning and fact finding in Section 2 cases. In evaluating a vote dilution claim

> the trial court is to consider the 'totality of the circumstances' and to determine, based "upon a searching practical evaluation of the 'past and present reality,' " . . . whether the political process is equally open to minority voters. " 'This determination is peculiarly dependent upon the facts of each case,' " . . . and requires and 'intensely local appraisal of the design and impact' of the contested electoral mechanism.

Thornburg v. Gingles, supra, 478 U.S. at 79. If the three judge court conducted such an analysis in this case, something it expressly disavowed, it failed utterly to indicate how it had done so.[4] Consequently, it is impossible for this Court meaningfully to review the decision of the district court for error, and dismissal or affirmance would be inappropriate.

The appellees try themselves to supply the missing Section 2 analysis in this case, but their attempts are unavailing. Appellee Sheheen, for example, says that SRAC "presented Section 2 testimony and evidence to the Court and the Court utilized this information in the drawing of its plans." Motion to Dismiss or Affirm of Robert J. Sheehen, pp. 15-6. SRAC did indeed present Section 2 testimony and evidence, but since the three judge court "decided against conducting a full § 2 inquiry," App. 44, it is impossible to say if, or how, the court utilized the information.

Appellees also analyze the evidence of polarized voting and argue that it was "simply inadequate." Motion to

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[4] Compare, for example, the detailed Section 2 findings of the district court in Gingles v. Edmisten, 590 F.Supp. 345, 357-75 (E.D.N.C. 1984), aff'd sub nom. Thornburg v. Gingles, supra, with the non-findings of the district court in this case.

Dismiss or Affirm of the South Carolina Senate, p. 7. The problem with the appellees' argument is that it is not the analysis of the parties but the analysis of the district court that would be subject to review in this case, an analysis the district court failed to make.

IV. The Issues Are Substantial

It is clear from the appellees' motions to dismiss or affirm that this case presents issues of substantial importance involving the application of Section 2 to court ordered redistricting and that there is a conflict among the decisions of lower courts. One of the central questions presented is whether – in a jurisdiction where voting is racially polarized and blacks lack the equal opportunity to participate in the political process and elect candidates of their choice – a court is obligated to create reasonably compact and contiguous majority black districts where it is possible to do so. SRAC believes the answer, based upon the legislative history of Section 2 and *Thornburg v. Gingles, supra,* is "yes." *See also, Garza v. County of Los Angeles,* 918 F.2d 763, 776 (9th Cir. 1990) ("[t]he deliberate construction of minority controlled voting districts is exactly what the Voting Rights Act authorizes"). The three judge court and the appellees believe the answer is "no," and that to create majority black districts under the circumstances described above is to apply a "racial ratchet," App. 30-1, or unfairly "maximize" the number of majority black districts. Motion of Appellee Lieutenant Governor Nick Theodore to Dismiss or Affirm, p. 27.

SRAC has never claimed, as the appellees wrongly charge, that it is entitled to some form of proportional representation or to a redistricting plan that provides the greatest possible number of majority black districts. Its contention, rather, is that where there is proof that voting is racially polarized and that blacks lack the equal opportunity to elect candidates of their choice they are entitled

to reasonably compact and contiguous majority black districts where they can be drawn. *See, e.g., Mississippi Republican Executive Committee v. Brooks,* 469 U.S. 1002, 1004 (1984) (the creation of a majority black congressional district was not based upon "an entitlement to some form of proportional representation" but "on specific findings of fact describing the impairment – or 'dilution' if you will – of the voting strength of the black minority") (concurring opinion of J. Stevens). If, for example, blacks were not politically cohesive, or if whites did not vote as a bloc, or if blacks enjoyed sustained and significant electoral success, a court would have no duty to create *any* majority black districts. *Thornburg v. Gingles, supra,* 478 U.S. at 77.

The extent to which a court in court ordered redistricting is required to conduct a Section 2 analysis and create majority black voting districts are issues which permeate voting rights litigation and over which the lower courts are obviously divided. The resolution of these issues is of the greatest importance to redistricting and minority voting rights.

Conclusion

For these reasons the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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